

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34563

DARWIN ALLEN STRICKLAND,	)	2009 Unpublished Opinion No. 425
	)	
Petitioner-Appellant,	)	Filed: April 15, 2009
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Gooding County. Hon. R. Barry Wood, District Judge.

Order denying petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Judge

Darwin Allen Strickland appeals from the district court's denial of his petition for post-conviction relief after an evidentiary hearing. We affirm.

I.

FACTS AND PROCEDURE

Strickland's thirteen-year-old daughter reported that he had fondled her several times in her bed during the middle of the night. She stated that Strickland had rubbed her chest, both under and over her pajamas, rubbed her stomach and buttocks, "would sometimes rub below her belly" on the outside of her pajamas, and that when he had gotten into her bed she could feel what she believed to be his erect penis touching her buttocks. As a result of these allegations, Strickland was charged with one count of lewd conduct with a minor under sixteen, Idaho Code § 18-1508, and one count of sexual abuse of a child under sixteen, I.C. § 18-1506.

Pursuant to an Idaho Criminal Rule 11 plea agreement, the state amended the second count to felony injury to a child, I.C. § 18-1501(1), dismissed the charge of lewd conduct with a minor under sixteen, and dismissed a perjury charge in another case. In exchange, Strickland entered an *Alford*<sup>1</sup> plea to felony injury to a child. The district court imposed a unified sentence of ten years with eight years determinate, which was subsequently affirmed by this Court in an unpublished opinion. *State v. Strickland*, Docket No. 31936 (Ct. App. June 16, 2006).

Strickland filed a *pro se* petition for post-conviction relief and a request for appointment of counsel. The state filed an answer to his petition and a motion for summary disposition. Through his appointed counsel, Strickland filed an affidavit in support of his petition and opposed the state's request for summary dismissal. After a hearing, the district court denied the state's motion and scheduled an evidentiary hearing. After the evidentiary hearing was held, the district court denied Strickland's petition for post-conviction relief. He now appeals.

## II.

### ANALYSIS

Strickland asserts that the district court erred in denying his claim for post-conviction relief based on his contention that his counsel was ineffective for refusing to “vigorously” cross-examine the complaining witness. Specifically, he alleges that at the evidentiary hearing on his post-conviction petition, he provided undisputed evidence that trial counsel had, in fact, refused to cross-examine the victim if the case went to trial and that the evidence presented further showed that he would not have pled guilty and would have taken his case to trial, but for counsel's deficient performance.

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district

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<sup>1</sup> See *North Carolina v. Alford*, 400 U.S. 25 (1970).

court. *Larkin v. State*, 115 Idaho 72, 764 P.2d 439 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994). We evaluate an attorney's performance at the time of the alleged error, not in hindsight, and presume that trial counsel was competent and that trial tactics were based on sound legal strategy. *State v. Porter*, 130 Idaho 772, 791-92, 948 P.2d 127, 146-47 (1997).

At the evidentiary hearing on Strickland's post-conviction petition, only two witnesses testified: Strickland and his stepfather, Stephen Timm. Strickland admitted that due to medication he was taking, his memory and ability to reason were affected. He testified that he could not remember pleading guilty, if he was prejudiced by trial counsel's representation of him, or if he felt coerced to plead guilty. He did claim that he remembered asking counsel to cross-examine the victim if the case went to trial, but he then admitted that he did not remember "the substance of the conversation" on the issue. He also stated that he had wanted to go to trial and that he would have "if things were different with [trial counsel]."

Timm testified that Strickland's trial counsel had been made aware that the complaining witness "had a history of untruths and other unsavory activity" and that on two occasions, Timm had discussed with counsel the issue of counsel's possible cross-examination of the victim. He testified that he first spoke to counsel prior to Strickland pleading guilty and when asked if he would put the victim on the stand should the case go to trial, counsel had responded that "he'd be darned if he put a 13 year old girl on the stand and tear her up in front of a jury." Timm stated that he spoke to counsel again after Strickland's sentencing and asked him why he had not intended to cross-examine the victim. Counsel again stated that "he'd be darned if he'd put a 13 year old girl on the stand and tear her apart in front of a jury, and be looked at as a monster."

In denying Strickland's motion, the district court first concluded that Strickland's testimony was largely not believable as he had "disqualif[ied] himself as a witness by being medicated, by having no recollection, by having no memory" and concluded that as a result, the value of Strickland's testimony was "essentially zero, or whatever weight to be ascribed to it [was] extremely nominal." It also recognized that Timm's testimony was undisputed that Strickland's trial counsel had stated that he would not cross-examine a thirteen-year-old girl and "tear her apart in front of a jury." The court concluded that in light of this evidence, Strickland had not shown that his counsel's performance was deficient, or that even if it was deficient, that he was prejudiced by counsel's indication that he would not cross-examine the victim at trial.

We conclude Strickland did not establish that counsel's indication that he would not aggressively cross-examine the victim constituted deficient performance. As we indicated above, we will not second guess actions by counsel that are "trial tactics" or "strategy choices" unless such decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. Strickland has not proven that counsel's decision not to cross-examine the victim was anything more than a trial tactic gleaned from his experience as an attorney in general and with this case in particular. As the state points out, the record indicates as much. For example, at the change of plea hearing, the following exchange took place between the court and defense counsel, showing that defense counsel was familiar with the particularities of the case:

The Court: [Defense counsel], do you believe that you've had sufficient time to discuss this case and all of its ramifications with your client?

[Defense Counsel]: Yes, Your Honor. If I may add a little bit to the record, in my investigation of this case I had the police reports, which I went over with my

client. I had a chance prior to the preliminary hearing to review a video of the CARES interview in Twin Falls, and then we did have a preliminary hearing in this case in which [the victim] testified. Based on her testimony at the preliminary hearing, if she would testify in the same manner in the trial, which was scheduled, it would be my belief that there would be sufficient facts upon which a jury could find my client guilty beyond a reasonable doubt. And so that's why--but by her testimony she did testify that there was some inappropriate touching as set forth by [the state], and I believe a jury could find her a credible witness.

In addition, the record shows that defense counsel cross-examined the victim at the preliminary hearing. Through this preparation and his subsequent evaluation that a jury would find the victim to be a "credible" witness, it is certainly understandable that he would be hesitant to "vigorously" cross-examine her lest she gain the sympathy of the jury and he (and as a result, Strickland), face their ire. We agree with the state that the record does not indicate that counsel reached this decision by ignorance of the law or another deficiency. The district court did not err in denying Strickland's petition for post-conviction relief, because Strickland failed to present evidence that would establish that his attorney's performance was deficient such that he received ineffective assistance of counsel. Accordingly, the order of the district court denying Strickland's petition for post-conviction relief is affirmed.

Chief Judge LANSING and Judge GRATTON **CONCUR.**